# EXHIBIT H

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2   UNITED STATES BANKRUPTCY COURT

3   SOUTHERN DISTRICT OF NEW YORK

4   Adv. Case No. 08-01421-rdd, Lead Case No. 06-12226-rdd

5   - - - - - - - - - - - - - - - - - - - -x

6   In the Matter of:

7   COUDERT BROTHERS, LLP,

8          Debtor.

9   - - - - - - - - - - - - - - - - - - - -x

10  DEVELOPMENT SPECIALISTS, INC.,

11                   Plaintiff,

12          -against-

13  WEISER REALTY ADVISORS LLC, ET AL.,

14                   Defendants.

15  - - - - - - - - - - - - - - - - - - - -x

16               U.S. Bankruptcy Court

17               One Bowling Green

18               New York, New York

19

20               March 5, 2009

21               10:11 a.m.

22

23  B E F O R E:

24  HON. ROBERT D. DRAIN

25  U.S. BANKRUPTCY JUDGE

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2    MOTION to Dismiss Adversary Proceeding 08-01421

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4    MOTION to Dismiss Adversary Proceeding 08-01418

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25    Transcribed by: Sharona Shapiro

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 2    A P P E A R A N C E S :

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16           THOMAS R. MANISERO, ESQ.

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Development Specialists, Inc. v. Weiser Realty Advisors, LLC

1   complaint, which seeks to avoid as a fraudulent transfer the

2   debtor's entry into an amendment of its New York lease as of

3   September 23, 2005 which provided for, among other things, a

4   partial surrender of its premises to the landlord in the Grace

5   Building as well as a modification of rent going forward; a

6   return or termination of the debtor's interest in subleases

7   that went hand in hand with the surrender of space; certain

8   other modifications of the lease; a return of a portion of the

9   security deposit; and payments in connection with the entry by

10   Coudert into an agreement with Baker & Mckenzie with respect to

11   the transfer of the fourth floor and the forty-second through

12   forty-fourth floors of the building (The payment resolved an

13   interest of the landlord in such payments under the original

14   lease and related disputes); and, finally, a modification of

15   the term of the remaining lease so that it would expire in 2008

16   -- on June 30, 2008 -- as opposed to in 2013.

17        The motion to dismiss contends that because the

18   debtor in possession assumed the lease as modified during the

19   course of its Chapter 11 case, that the plaintiff is now

20   estopped, primarily under a theory of judicial estoppel, from

21   avoiding the transfers pursuant to the lease modification that

22   I've just summarized.

23        The movant relied upon numerous cases that have

24   granted motions to dismiss preference actions after the

25   underlying contract, pursuant to which the preferential

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Development Specialists, Inc. v. Weiser Realty Advisors, LLC

1    transfer was allegedly made, had been assumed.  In addition,

2    the movant relied upon three cases in which that fact pattern

3    was extended from preference avoidance actions to actions to

4    avoid fraudulent transfers.  See Official Committee of

5    Unsecured Creditors v. Aust, (In re Network Access Solutions

6    Corp.), 330 B.R. 67 (Bankr. D. Del. 2005); Vision Metals Inc.

7    v. SMS Demag, Inc. (In re Vision Metals Inc.), 325 B.R. 138,

8    141 (Bankr. D. Del. 2005), reh'g granted, 327 B.R. 719 (Bankr.

9    D. Del. 2005)(both of those decisions are by Judge Walrath), as

10   well as Schnelling v. Crawford (In re James River Coal Co.),

11   360 B.R. 139 (Bankr. E.D. Va. 2007).

12          Given the requirement under Section 365 to cure all

13   defaults, including pre-petition defaults, under an executory

14   contract before such contract can be assumed, the logic of the

15   preference cases relied upon by the landlord was crystal clear

16   to me.  It was less clear to me that judicial estoppel, as a

17   result of assumption of an executory contract or lease, would

18   extend to the fraudulent transfer cause of action where the

19   contract or lease had been amended pre-petition and that

20   amendment was sought to be avoided as a fraudulent transfer.

21          That concern on my part was enhanced by the fact that

22   in each of the three cases that I have cited, all of which I

23   agree with completely, the parties had specifically agreed to a

24   release of claims or it was clear that such a release had been

25   contemplated at the time of the action in question, which might